

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL AGRICULTURAL)
MORTGAGE CORP.,)
)
Plaintiff(s),)
v.)
)
IT'S A JUNGLE OUT THERE ,)
INC dba VINTAGE CAPITAL,)
et al.,)
)
Defendant(s) .)

No. C 03-3721 BZ

**ORDER DENYING PLAINTIFF'S
MOTION FOR ATTORNEYS' FEES**

AND RELATED CLAIMS.

On January 31, 2006, following a two week trial, the jury returned a verdict in favor of plaintiff Federal Agricultural Mortgage Corporation and against defendants It's A Jungle Out There, Inc. dba Vintage Capital and its principals Robert Hower and Ami Cheri Hower. On plaintiff's claim for breach of the express indemnity provision in the contract between the parties, the jury awarded plaintiff

1 \$1,532,458 in damages, which included approximately \$100,000
2 in attorneys' fees. Subsequently, plaintiff moved pursuant
3 to Federal Rule of Civil Procedure 54(d) for an award of
4 additional attorneys' fees in the amount of \$858,916.77.

5 Rule 54(d)(2) provides that "[c]laims for attorneys'
6 fees and related non-taxable expenses shall be made by motion
7 unless the substantive law governing the action provides for
8 the recovery of such fees as an element of damages to be
9 proved at trial." Fed. R. Civ. P. 54(d)(2)(A). As the
10 Advisory Committee's notes make clear, Rule 54(d)(2) does not
11 "apply to fees recoverable as an element of damages, as when
12 sought under the terms of a contract; such damages typically
13 are to be claimed in a pleading and may involve issues to be
14 resolved by a jury." Fed. R. Civ. P. 54(d)(2) advisory
15 committee's note (1993).

16 Plaintiff noticed its motion "on the grounds that the
17 Plaintiff's contract with Defendants. . .contains an
18 attorneys' fees provision entitling Plaintiff as the
19 prevailing party on Plaintiff's claims" to an award of fees
20 and expenses. (Notice Page 1, lines 10-14). In its
21 memorandum, however, plaintiff points to no provision in the
22 contract which expressly awards fees to the prevailing party.
23 Instead, plaintiff relies solely on § 503.3 of the contract,
24 the indemnity provision. Defendants, on the other hand, deny
25 that the indemnity provision is a prevailing party attorneys'
26 fees provision and assert that where attorneys' fees are
27 claimed pursuant to an indemnification provision, "the
28 attorney fees are an element of damages, which must be

1 pleaded and proved in the indemnification action.”
2 (Opposition Page 3, lines 14-15). This requires the court to
3 determine whether § 503.3 permits attorneys’ fees to be
4 awarded by post-trial motion or requires them to be proven at
5 trial as an element of damages.

6 Section 503.3 reads as follows:

7 The Seller shall indemnify Farmer Mac and its
8 directors, officers and other employees and
9 hold each of them harmless against any and
10 all losses, claims, damages, judgments,
11 penalties, fines and legal costs and
12 expenses, including reasonable attorneys’
13 fees, that they may sustain as a result of or
14 arising out of any event of default,
including but not limited to those that are
in any reasonable way related to the actual
or alleged failure of the Seller to perform
its duties and service the Qualified Loans in
strict compliance with the terms of its
Seller/Service Agreement and the Guide.

15 In this diversity action, California provides the
16 substantive law governing the action. MRO Communs., Inc. v.
17 Am. T & T Co., 197 F.3d 1276, 1281 (9th Cir. 1999). Under
18 California substantive law, in an appropriately worded
19 indemnity provision, attorneys’ fees are an element of the
20 claim for indemnity. See California Civil Code § 2778.
21 Several California cases have affirmed indemnity judgments
22 which awarded attorneys’ fees as part of the claimed
23 indemnity; not as a result of a post-trial motion. See e.g.
24 Continental Heller Corp. V. Amtech Mechanical Services, 53
25 Cal.App.4th 500 (1997); Schackman v. Universal Pictures Co.,
26 Inc., 255 Cal.App.2d 857 (1967). Plaintiff relies on cases
27 which have interpreted provisions in a contract which
28 permitted the prevailing party to obtain attorneys’ fees.

1 PLCM Group, Inc. v. Drexler, 22 Cal.4th 1084, 1088 (2000);
2 Nevin v. Salk, 45 Cal.App.3d 331, 338 (1975). None of
3 plaintiff's cases interpret an indemnification provision of
4 the sort present here.

5 The only indemnification case cited by plaintiff, DeWitt
6 v. Western Pacific Railroad Company, 719 F.2d 1448 (9th Cir.
7 1983), is not very helpful. The issue in DeWitt was whether
8 attorneys' fees should have been awarded as part of the
9 indemnity claim. It does not appear that the indemnitor ever
10 suggested that the fees issue should have been submitted to
11 the jury trying the underlying dispute.¹

12 The California Supreme Court has ruled in a different
13 context that when attorneys' fees are recoverable as an
14 element of damages for breach of contract, "the determination
15 of the recoverable fees must be made by the trier of fact
16 unless the parties stipulate otherwise." Brandt v. Superior
17 Court, 37 Cal.3d 813, 819 (1985). Here, there was no
18 stipulation that the fees should be awarded by the court
19 post-judgment. Although asked by the pretrial order "whether
20 bifurcation or a separate trial of specific issues is
21 feasible and desired," plaintiff did not request any special
22 treatment of the attorneys' fees claim. See Baldwin Builders
23 v. Coast Plastering Corp., 125 Cal.App.4th 1339, 1342

24
25 ¹ Plaintiff's reliance during argument on U.S. for Use
26 and Benefit Familian Northwest, Inc. v. RG & B Contractors,
27 Inc., 21 F.3d 952 (9th Cir. 1994) was misplaced. The Ninth
28 Circuit was careful to distinguish its holding that a request
for attorneys' fees authorized by contract did not have to be
asserted prior to the entry of judgment under Rule 59(e), from
cases "where attorney's fees are part of the merits of a
claim," precisely the case here. Id. at 955 n.2.

1 (2005) ("The parties stipulated that the issue of attorney
2 fees and costs . . . would proceed in a postverdict bench
3 trial.").²

4 Several additional factors support a ruling that
5 plaintiff's attorneys' fees in this case are part of its
6 damages and should have been resolved by the jury. First is
7 the way plaintiff's claims were pled. The original complaint
8 contained a Third Claim for Breach of Contract in which
9 plaintiff did not ask for attorneys' fees as the prevailing
10 party. Plaintiff only requested attorneys' fees for an
11 alleged violation of the Lanham Act. Two years later,
12 plaintiff filed an amended complaint which added a Sixth
13 Claim for Express Indemnity. In paragraph 51, plaintiff
14 alleged that as a result of defendants' default, it had
15 suffered monetary damages including attorneys' fees and costs
16 incurred in foreclosing on the loan and collecting sums owed
17 it and fees and costs it had incurred and would continue to
18 incur in prosecuting this action. A fair reading of
19 plaintiff's pleadings is that it did not interpret § 503.3 of

20
21 ² Plaintiff's counsel argued at the hearing that
22 Baldwin supported plaintiff's position since it held that an
23 indemnity provision that provided for attorneys' fees was
24 reciprocal under California Civil Code § 1717. The provision
25 in Baldwin, after requiring the Subcontractor to indemnify
26 Baldwin against specified claims and damages arising out of a
27 contract, contained this concluding sentence: "Subcontractor
28 shall pay all costs, including attorney's fees incurred in
enforcing this indemnity agreement." 125 Cal.App.4th 1339,
1342. In ruling that this provision was reciprocal, the court
recognized that the rule of reciprocity would not apply "where
the recovery of attorney fees is authorized as an item of loss
or expense in an indemnity agreement or provision." Id. at
1344. (citations omitted). § 503.3 does not contain the sort
of language which compelled the Baldwin court to apply the
§ 1717 reciprocity principles.

1 the contract as a prevailing party attorneys' fees provision
2 but understood that it could only recover such fees as an
3 element of damages for breach of the indemnity agreement.³

4 Second is the fact that approximately \$100,000 in
5 attorneys' fees were submitted to the jury and were awarded
6 as damages. Plaintiff provides no satisfactory explanation
7 for failing to include in its claim for damages at trial the
8 attorneys' fees that are the subject of this post-trial
9 motion.⁴ Nothing in the indemnification provision suggests
10 that plaintiff's claim for attorneys' fees can be split and

11 ³ Plaintiff's pretrial statement so reflects. In its
12 section on damages plaintiff states:

13 In this regard, the Plaintiff claims attorneys' fees
14 as an item of compensatory damages in this case . . .
15 Plaintiff was required to retain attorneys to
16 foreclose on the collateral, and to pursue the
17 deficiency judgment against the borrowers and FARMER
18 MAC's damages against the Defendants herein. These
attorneys' fees are an item of compensatory damages
which flow directly and proximately from Defendants'
breaches and wrongful conduct and will be presented
as evidence during the Plaintiff's case in chief. . .

19 Joint Pre-trial Conference Statement filed October 11, 2005
[docket # 219-1] Page 25, lines 16-23.

20 Plaintiff also sought attorneys' fees pursuant to the
21 Lanham Act. "These attorneys' fees will be sought by Plaintiff
22 in accordance with post-trial motion procedures pursuant to
Federal Rules of Civil Procedure, Rule 54." Id. at Page 26,
lines 14-18.

23 ⁴ During oral argument, plaintiff explained that it
24 presented to the jury only those attorneys' fees not
25 attributable to the prosecution of this lawsuit, which had been
26 incurred prior to the filing of this lawsuit. This may have
27 proven to be a convenient dividing line on the facts of this
28 case, but as a matter of substantive contract law, it is
difficult to understand why, if the only source of recovering
legal fees is an indemnity provision which permits the recovery
of all legal fees that may result from an event of default,
there is any substantive justification for plaintiff's bright
line.

1 some fees claimed before the jury and others claimed post-
2 judgment.

3 Third, construing this indemnification provision as a
4 prevailing fee provision would strain California Civil Code §
5 1717, which provides that attorneys' fees provisions must be
6 reciprocal. Farmers Ins. Exchange v. Law Offices of Conrado
7 Joe Sayas, Jr., 250 F.3d 1234, 1237 (9th Cir. 2001) ("Section
8 1717 was enacted to provide for a mutuality of remedy when a
9 contract makes recovery of attorneys' fees available only to
10 one party."). See Myers Building Industries, Ltd. v.
11 Interface Tech., Inc., 13 Cal.App.4th 949, 971 (1993)
12 ("provision including attorney fees as an item of loss in an
13 indemnity clause is not a provision for attorney fees in an
14 action to enforce the contract" which would trigger § 1717).⁵
15 Section 503.3 obligates the seller of a loan to indemnify
16 plaintiff as buyer from certain losses it may sustain as a
17 result of any event of default. It would seem contrary to
18 the intent of the parties in apportioning their risks to
19 conclude that this was intended to be a reciprocal provision,
20 such that the buyer could be required to also indemnify the
21
22
23

24 ⁵ The court in Myers struck an attorneys' fees award to
25 the contractor because the indemnity provisions indemnifying
26 the subcontractors did not contain an attorneys' fee provision,
27 and thus, California Civil Code § 1717 was inapplicable and
28 there was no reciprocity. The indemnity provisions, similar to
the one in this case, required the contractor to "indemnify"
and "hold harmless" against "all losses and expenses" including
attorneys' fees "arising out of" performance of the work or
agreement.

1 seller for those losses in the event of default.⁶

2 Authority from other jurisdictions supports a ruling
3 that plaintiff is entitled to only the attorneys' fees it
4 proved as an element of damages. In Aetna Cas. & Sur. Co. v.
5 Giesow, 412 F.2d 468 (2nd Cir. 1969), the court stated that
6 attorneys' fees sought pursuant to an indemnification
7 provision "are a contractually specified element of damages"
8 which "cannot be enforced apart from the claim for breach of
9 the [contract], and to this extent we have only a single
10 claim here." Id. at 470. In Carolina Power and Light Co. v.
11 Dynegy Marketing and Trade, 415 F.3d 354 (4th Cir. 2005), the
12 court held that legal costs sought under a contractual
13 provision were an element of damages to be proved at trial.
14 Id. at 359. The indemnity provision in Carolina Power
15 permitted the plaintiff in the event of a breach to recover
16 certain specified damages as well as its "'reasonable out-of-
17 pocket expenses incurred by [a party], including legal fees,
18 by reason of the enforcement and protection of its right
19 under [the contract].'" Id. at 357. The Fourth Circuit
20 noted that the legal costs provision in the contract was not
21 premised on the plaintiff prevailing in the underlying action
22 but, along with the other damages to which it was entitled,
23 was part of the plaintiff's remedies for the buyer's breach.

24
25 ⁶ "Because an indemnity agreement is intended by the
26 parties to unilaterally benefit the indemnitee, holding it
27 harmless against liabilities and expenses incurred in defending
28 against third-party tort claims (see Civ. Code, § 2772),
application of reciprocity principles would defeat the very
purpose of the agreement." Baldwin, 125 Cal.App.4th at 1344.

1 [U]nlike a right to nonsubstantive attorneys fees
2 that are collateral to the merits of an action,
3 which does not accrue until the litigation is
4 actually brought, the seller's right to legal costs
under the contract between the parties in this case
arises as soon as the buyer rejects a delivery of
coal.

5 Id. at 359. Here too, plaintiff's claim to attorneys' fees,
6 along with its other remedies under the indemnification
7 provision, arose as soon as the event of default occurred and
8 was not triggered by its prevailing in this action.

9 By presenting only a portion of its attorneys' fees
10 claim at trial, plaintiff in effect improperly split its
11 claim to be indemnified for attorneys' fees it incurred as a
12 result of an event of default.⁷ In U.S. Industries, Inc. v.
13 Blake Const. Co., Inc., 765 F.2d 195 (D.C. Cir. 1985), a suit
14 under a broad indemnity provision to recover attorneys' fees
15 was held barred by res judicata because plaintiff "had an
16 opportunity to present evidence with respect to these claims
17 during the six-week jury trial; it did not do so, but instead
18 made a unilateral decision not to pursue the attorneys' fees
19 claims" at trial. Id. at 206. Among other things, the D.C.
20 Circuit affirmed the trial court's ruling that plaintiff had
21 improperly "split" its claim for attorneys' fees by not
22 presenting in the related prior proceeding its claim for the
23 attorneys' fees it was seeking in the second proceeding. Id.
24 at 203.

25 ⁷ While plaintiff argues that it has not "split" its
26 claim because final judgment has not yet been entered, the fact
27 remains that the jury has given its verdict and has been
28 discharged and plaintiff has not suggested a way to reopen the
jury trial to permit it to resolve the claim to additional
attorneys' fees.

1 McGuire v. Miller, 1 F.3d 1306 (2nd Cir. 1993), cited by
2 plaintiff in its reply, is distinguishable. In McGuire, at a
3 pretrial conference, the trial court discussed the issue of
4 attorneys' fees with counsel. After determining that there
5 was an indemnity provision which provided defendants with the
6 right to attorneys' fees, the trial court decided not to ask
7 the jury to determine the amount of the fees. Id. at 1313.
8 In reliance thereon, defense counsel assumed that the amount
9 of any attorneys' fees to which defendants were entitled
10 would be established at a later hearing and did not introduce
11 proof of their attorneys' fees at trial. The trial court
12 then denied a post-trial request for attorneys' fees on the
13 grounds that they had not been proved to the jury. Id. at
14 1309. The Second Circuit reversed, ruling that it was not
15 unreasonable for defendants to have assumed, based on the
16 history of the case, that the amount of attorneys' fees would
17 be resolved in a post-trial hearing. Id. at 1313.

18 The Court went on to consider: "what procedure a
19 district judge should follow in deciding a contractual claim
20 for attorneys' fees." Id. It announced that in the Second
21 Circuit the question of entitlement to attorneys' fees is for
22 the jury but the question of the amount of such fees should
23 be resolved by the court.⁸ Whatever the merits of that rule,

24
25 ⁸ While I understand the practical problems presented
26 if attorneys' fees are determined by the jury, enumerated by
27 the Second Circuit, I am not persuaded that they are more
28 difficult than problems juries face in determining damages in
any complex case. McGuire, 1 F.3d at 1315. In this case,
plaintiff persuaded the jury to include approximately \$100,000
in attorneys' fees in its damages award without encountering
any proof problems that were apparent to the court.

1 it appears not to be the law of the Ninth Circuit; it is
2 inconsistent with rulings of other circuits discussed above;
3 and it seems inconsistent with Rule 54(d)(2)(A), not
4 discussed in McGuire, which by its very terms suggests that
5 there will be instances in which attorneys' fees issues are
6 to be resolved by a jury. McGuire is also factually
7 distinguishable. This court never did anything to suggest
8 that plaintiff need not prove all of its damages, including
9 attorneys' fees, to the jury; plaintiff did prove almost
10 \$100,000 in attorneys' fees; and plaintiff never asked for a
11 jury finding of entitlement to attorneys' fees. To the
12 contrary, all the special verdict forms proposed by plaintiff
13 simply asked the jury to determine: "What do you find to be
14 the total damages sustained by the Plaintiff caused by
15 Defendant Vintage Capital's breach of its duty to indemnify
16 Plaintiff against any default arising from the Ram Loan?"

17 For the foregoing reasons, plaintiff should have
18 presented to the jury all of its claims for damages under the
19 indemnity provision, instead of bringing up a delayed
20 request, without stipulation or permission, for more damages
21 in the form of a post-trial motion. **IT IS ORDERED** that
22 plaintiff's motion for attorneys' fees is **DENIED**.

23 DATED: May 9, 2006

24 
25 Bernard Zimmerman
26 United States Magistrate Judge